stances, there being a misdirection by way of non-direction, in the course of the trial, which related to a fundamental issue and travelled to the root of the charge, the principle involved is more important than the case itself and so, the conviction cannot stand.

I next have to consider whether a retrial should be ordered. Mr. Karpal Singh has strongly urged upon me that to order a retrial would merely afford the prosecution a second opportunity of proving a case which they had failed to prove. I recognise the force of this submission and am mindful of the salutary observations of Murison, C.J. in *Rex* v. *Howe*[6] on this subject. But equally, I cannot overlook the fact that the unchallenged and uncontradicted evidence against the Appellant was absolutely overwhelming. In this context, I would instance the circumstances in which the offending exhibit was recovered from his person, concealed in a cloth pouch cunningly tied around his waist, the fact that when queried as to it, he replied that it was fertiliser for his plants nor, for that matter, did he care to explain its possession when called upon for his defence in the court below, although he faced a charge of the utmost gravity, carrying a mandatory sentence of life impriosnment with liability to whipping up to twenty four strokes of the ratan. Also, whether P.W.7's evidence or the Chemist's Report is accepted, the offending exhibit was still a dangerous drug within the meaning of the Act. Lastly, there is the element of public interest which is emphasized in the more stringent measures recently introduced by the Dangerous Drugs (Amendment) Act, 1983, to combat the drug menace which is now a national security problem.

I accordingly quash the conviction, set aside the sentence and direct a re-trial before another President. The Appellant will be remanded in custody pending the re-trial. The Public Prosecutor's appeal against sentence is, in consequence, dismissed.

Order accordingly.

Solicitors: *Karpal Singh & Co.*

ABDUL KADIR BIN ABDUL RAHMAN v. PUBLIC PROSECUTOR

[A.Cr. J. (Shankar J.) September 13, 1983]
[Johore Bahru – Criminal Appeal No 8 of 1982]

Criminal Law & Procedure – Criminal breach of trust by public servant – Plea of guilt – Appeal after sentence – Whether appellant should be allowed to retract plea of guilt – Penal Code, s. 409.

Legal Profession – Accused should plead guilty or claim trial by his own mouth and not through his counsel or advocate – Legal Profession (Practice and Etiquette) Rules 1978, r. 16.

The appellant, a public servant and Postmaster of the Post Office at Scudai, Johore was charged with criminal breach of trust of $200.00 cash belonging to the Government of Malaysia, being money deposited with the Post Office Savings Bank Malaysia. The said offence was punishable under section 409 of the Penal Code.

The facts revealed that the accused had received the sum of $200.00 from the complainant and had made the relevant entry into the complainant's savings bank book, but had not made a corresponding entry into the register containing all the takings for the day which it was the appellant's duty to keep and maintain. In response to an audit query two weeks later by headquarters the appellant could not account for the missing $200.00. The said facts were admitted by the accused. He was then convicted and counsel made a lengthy plea of mitigation but nowhere in the plea was there any attempt to explain what might have become of the missing $200.00. The learned President sentenced the appellant to 18 months' imprisonment and she granted a stay of execution pending appeal.

The issue before the court was whether the appellant should be allowed to retract his plea of guilt.

Held, dismissing the appeal: (1) whilst there is a discretion vested in the trial court to permit an accused person before sentence to withdraw a plea of guilt and to substitute a plea of not guilty that discretion requires to be exercised judicially and for valid reasons. An accused person cannot be permitted merely at his whim to change his plea except on valid and sufficient grounds which satisfy the magistrate that it is proper in the interest of justice that he be allowed to do so:

(2) in this case there was no justification for permitting the appellant to indirectly seek to reverse his plea of guilt by inviting the court to exercise its revisionary powers;

(3) there can be no gainsaying that public servants receiving money from other members of the public must show very high standards of probity in the discharge of their fiscal duties. The loss of confidence in public institutions is incalculable when a public servant chooses to abuse his position of trust, as happened in this case. A deterrent sentence was rightly called for;

(4) an accused person should plead guilty or claim trial by his own mouth and not through his counsel or advocate. Once the plea of guilt is entered, it is the duty of counsel who still feels that the facts do not amount to an

offence to say so in unequivocal terms to the court of first instance. No mileage can be gained by some half-hearted submission on appeal that the plea of guilt was made against counsel's advice;

(5) in the circumstances of this case the ends of justice would equally have been met by the imposition of a very substantial fine and the sentence should be varied to 3 days and a fine of $5,000 or in default 18 months' imprisonment.

Obiter Dictum: "An unrepresented person may be forgiven for producing newspaper reports in aid of his submission in court. It would be a sad day for the legal profession if qualified advocates and solicitors have to rely on newspaper reports alone to back up their submissions on sentencing trends".

Cases referred to:

(1) *Heng Kim Khoon* v. *Public Prosecutor* [1972] 1 M.L.J. 30.
(2) *Chen Chong & Ors.* v. *Public Prosecutor* [1967] 2 M.L.J. 130.
(3) *Sathiadas* v. *Public Prosecutor* [1970] 2 M.L.J. 241.
(4) *Abdul Aziz* v. *Public Prosecutor* [1963] M.L.J. 16.
(5) *Public Prosecutor* v. *Rengasamy* [1974] 1 M.L.J. 223.
(6) *Public Prosecutor* v. *Sam Kim Kai* [1960] M.L.J. 265.
(7) *R.* v. *McNally* [1954] 2 All E.R. 372.
(8) *R.* v. *Tan Thian Chai* [1932] M.L.J. 74.

CRIMINAL APPEAL.

R.K. Menon for the appellant.

Abdul Rahim bin Uda (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Shankar J.: The appellant was charged on February 18, 1982 in the Sessions Court at Johore Bahru as follows:—

"That you on January 8 1976, at the Post Office, Scudai, in the District of Johore Bahru, in the State of Johore, being a Public Servant, to wit, the Postmaster of the said Post Office, and in such capacity were entrusted with $200.00 cash belonging to the Government of Malaysia, being money deposited with the Post Office Savings Bank Malaysia, vide Post Office Savings Account No. Scudai 1954 committed criminal breach of trust of the said property, and that you have thereby committed an offence punishable under section 409 of the Penal Code."

He was represented by counsel. After the charge was read and explained and understood the appellant pleaded guilty.

The Prosecuting Officer then gave the court a short summary of the facts.

I do not propose to set out that summary in full in this judgment. Suffice it to say that after setting out the background the Prosecuting Officer added that the accused had received the sum of $200/— from the complainant, had made the relevant entry into the complainant's savings bank book, but had not made a corresponding entry into the register containing all the takings for the day which it was the appellant's duty to keep and maintain. In response to an audit query two weeks later by headquarters the appellant could not account for the missing $200/—.

These facts were admitted by the accused. He was then convicted and counsel made a lengthy plea for mitigation but nowhere in this plea is there any attempt to explain what might have become of the missing $200/—.

Section 409 of the Penal Code carries a mandatory sentence of imprisonment which may extend to 20 years and it also provides for liability to a fine.

It is obvious from the record that the learned President gave very careful consideration to the plea in mitigation and on February 18, 1982 she stated that in view of the mitigating factors in the matter she was sentencing the appellant to 18 months' imprisonment. She granted a stay of execution pending appeal.

Thereafter on February 18, 1982 the appellant gave formal notice of appeal followed by a petition of appeal on May 21, 1983 in which the petitioner stated himself to be dissatisfied with the conviction, decision and sentence of the learned President and appealed against the whole of her decision on various grounds.

In summary these grounds were directed to two issues namely that the facts disclosed in the plea of mitigation went towards negativing the offence to which the appellant had pleaded guilty and that the sentence imposed by similar courts in respect of similar offences.

It was strenuously urged by counsel for the appellant in this appeal that even though section 305 of the Criminal Procedure Code provided that

"When an accused person has pleaded guilty and been convicted by a magistrate on such a plea there shall be no appeal except as to the extent or legality of the sentence."

nevertheless this court should in the exercise of its discretion under section 325 of the Code reverse the plea of guilty and remit the case for a re-trial.

In support of this proposition counsel for the appellant cited *Heng Kim Khoon* v. *Public Prosecutor*[1]. The accused was not represented in the court of first instance. He admitted the facts but what he stated in mitigation clearly showed that his explanation amounted to a denial of guilt and the Appellate Court therefore in the exercise of its discretion allowed the appeal and sent the case back for re-trial.

Counsel for the appellant also referred to *Chen Chong & Ors.* v. *Public Prosecutor*[2]. He relied upon this case to support his contention that under section 173(b) of the Criminal Procedure Code there was a duty cast upon the prosecution to ensure that, when setting out the facts after a plea of guilt, the narrative was a complete legalistic catalogue of every necessary ingredient which constituted the offence. If any one such ingredient was missing it necessarily followed that the conviction could not stand and the exercise of the discretionary powers in revision should follow as a matter of course.

So far as the facts in this appeal were concerned it was the contention of the counsel for the appellant that the facts as stated by the prosecution merely amounted to an omission on the part of the appellant to account for monies which he admittedly had received.

Appellant's counsel submitted that the prosecution had to go further. It had to assert in the words of the section that the appellant had misappropriated the money or converted it to his own use, and it has also to show what the appellant had done with the money.

Counsel for the appellant went on to state that if there had been a trial then there would have a duty cast upon the appellant, in the circumstances, to advance an explanation as to what happened to the money, consistent with innocence. But since he had pleaded guilty, the onus remained upon the prosecution to include in its recital of the facts of the case, a positive assertion as to the fact of misappropriation and the manner in which the same had been carried out.

For the reasons which now follow, I hold these arguments to be without substance.

I am obliged to the learned Deputy Public Prosecutor Encik Abdul Rahim Uda for drawing the attention of the court to the case of *Sathiadas* v. *Public Prosecutor*[3] where at page 244 Raja Azlan Shah, J. (as he then was) stated:

> "It is settled law that mere failure of the appellant to account for the monies entrusted to him on the dates specified in the three charges might not be a foundation of his conviction in all cases but where he was unable to account and render an explanation for his failure, which was true, an inference of misappropriation with dishonest intent might readily be made. In my opinion if there was such subsequent payments then the Singapore office of Malaysia-Singapore Airways which did the processing of all daily returns would have discovered the same. The learned president found as a fact that the Singapore office did not find that the monies were subsequently paid. The other aspect of this matter is that since this is within the knowledge of the appellant, whose duty it was to prepare these returns, it was up to him to show the existence of such fact which is consistent with his innocence. He has failed to do that. For the purpose of establishing dishonest intention, it is not the law in this country, any more than it is the law in India, that the prosecution should go further and also prove the actual mode of misappropriation or conversion. Once the prosecution have proved that the appellant was entrusted with money for a specific purpose and that he has failed to account for it or has done something which is clearly indicative of his dishonest intention, the charge of dishonest misappropriation must be held to have been established unless the appellant shows the existence of some fact or circumstance in his own knowledge consistent with his own innocence. It must be stated here that for the purpose of establishing dishonest intention the prosecution is not required to eliminate all possible defences and circumstances which might exonerate the appellant, or that apart from providing the appellant's possession of the money and his inability to account for it, it has also to prove the exact manner of his disposal of the money in a manner contrary to the purpose for which he received it."

In considering this decision this court has not lost sight of *Abdul Aziz* v. *Public Prosecutor*[4] which is readily distinguishable on the facts since the appellant here not only admits receiving a specified sum of money but also would not account for its disappearance shortly afterwards.

The Deputy Public Prosecutor also cites *Public Prosecutor* v. *Rengasamy*[5] where similar observations have been made about the difficulty in proving precisely how misappropriated monies have been expended, such facts being peculiarly within the knowledge of the person entrusted therewith.

Counsel for the appellant had already conceded that if there had been a trial, and the appellant had taken the line which he did in wilfully omit-

ting to give any explanation as to what might have become of the money, he would have had no defence.

On the elementary principle that the greater must include the less, how then does it come about that a submission has been made in this court that in the circumstances of this particular case the conviction should not be allowed to stand? Is there, then a greater burden imposed upon the prosecution when the accused person pleads guilty than when he claims trial?

It must be emphasized here that nowhere in section 172(b) of the Criminal Procedure Code is it categorically stated that after a plea of guilt it is incumbent upon the prosecution to give a detailed and complete narrative of all the facts of the case together with a recitation in the language of the relevant section of each and every ingredient of the offence charged.

A modicum of diligence would have brought out to the fore that this salutary practice was initiated in Malaysia and in Singapore in order to ensure that in all cases the accused understood the nature and consequences of his plea and intended to admit without qualification the offence alleged against him.

Reference may be made in this connection to the standard textbook on Criminal Procedure i.e. *Mallal's* Criminal Procedure 4th Edition at page 253 where there is a commentary on section 172(b) of the Criminal Procedure Code of Singapore. That commentary and the cases cited thereunder should make it clear that the practice of setting out the facts is designed not only to ascertain whether admission of the facts amounts to a plea of guilt in law but also so that the court may form an opinion on the conduct of the accused present in assessing the sentence.

The established practice is that the narrative should be a short summary of the facts of the case. Of course the length of the narrative will depend on the nature of the charge and seriousness of the case.

I agree with the learned Deputy Public Prosecutor that one should take a common sense approach to this matter and it cannot be urged with any justification that the narrative is required to be some kind of litany in which the wording of the section of the code under which the accused has been charged should be faithfully reproduced.

To that extent I hold *Chen Chong & Ors.* v. *Public Prosecutor (supra)* which appellant's counsel cited is not authority for the proposition advanced by appellant's counsel.

The real thrust of the arguments advanced for the appellant was that he should be allowed to retract his plea of guilt.

No authorities were cited to the court on the approach it should take in such a case.

This court therefore feels obliged to invite the attention of counsel to the facts of *Public Prosecutor* v. *Sam Kim Kai*[6]. There Rigby, J. said after referring to *R.* v. *McNally*[7] that whilst there is a discretion vested in the trial court to permit an accused person *before sentence* to withdraw a plea of guilt and to substitute a plea of not guilty that discretion requires to be exercised judicially and for valid reasons. An accused person cannot be permitted merely at his whim to change his plea except on valid and sufficient grounds which satisfy the magistrate that it is proper in the interest of justice that he be allowed to do so.

In all the circumstances of this case it is my view that there is no justification for permitting the appellant to indirectly seek to reverse his plea of guilt by inviting the court, as has been done in this case, to exercise its revisionary powers.

This offence took place in 1976. The appellant claimed trial when he was produced in court and maintained that position until the very end when the case finally came up for hearing on February 14, 1982. One would have thought that if his *bona fides* were intact, he would have had some explanation as to what became of the missing monies which he admitted was handed to him. But at the date of final hearing he chose to advance no explanation whatsoever. This failure to advance any sort of explanation can in the view of the court lead to one inference and one only, namely the guilt of the accused. In the absence of a rebuttal that inference was enough to sustain the conviction against him. One must add to it that the omission of the appellant to enter the receipt of that money into the register for the daily takings on the date in question. If he had been honest, a windfall of $200/– should have been noticed in the cash-box. If he knew that the money was missing, having received it himself, he made no mention of it then. When the audit query came two weeks later, he still chose to make no explanation.

In passing I also feel obliged to make some mention of the difficulty that this court has had in reconciling the submission made by appellant's counsel with what happened in the court below. No where in the plea of mitigation was it stated by counsel who appeared for the appellant in the court below that the facts disclosed by the prosecution went towards negativing the offence to which the appellant had pleaded guilty and that the plea of mitigation in itself raised a defence. This was one of the grounds of appeal and in response to an invitation by the court to explain why counsel for the accused did not take such a position in the court below, it was stated that the appellant had pleaded guilty against the advice of his counsel.

This fact does not of course appear from the appeal record but in the view of the court it cannot assist the appellant to obtain the reversal of the plea of guilt in the court below, in all the circumstances of this case.

The appellant is not illiterate, but a person with some education. He was also a person of some maturity at the date of hearing being then about 29 years old. In addition he had already been through the entire legal process of another case in which he had been tried for a similar offence. There he had participated in the trial right up to the appeal stage. Thus it may be inferred that he also knew something of the workings of the law.

When such a person has a charge read over and explained to him and he says out of his own mouth that he understands the charge and chooses to plead guilty to it, it cannot in my view be contended with any justification that he did not then know the nature and the consequences of his plea.

In all the circumstances I rejected the arguments of the appellant's counsel and hold that his conviction must stand.

As to the matter of sentence counsel for the appellant produced a number of newspaper cuttings which had apparently been collected by the appellant himself.

They related to cases of Criminal Breach of Trust but no indication was given in most of the publications as to the date when those cases were tried. In all of them the accused person was sentenced to a day's jail and a substantial fine. In some of them the amounts involved were much larger than the sum with which we are concerned in this case.

An unrepresented person may be forgiven for producing newspaper reports in aid of his submissions in court. It would however be a sad day for the legal profession if qualified advocates and solicitors have to rely on newspaper reports alone to back up their submissions on sentencing trends.

Be that as it may I feel that in this particular case the learned President in sentencing the appellant to 18 months imprisonment may well have influenced by the fact that section 409 of the Penal Code appears to make a term of imprisonment mandatory and moreover the maximum term has been amended by law in 1976 to extend to 20 years.

But on all the facts of this case I do feel that some emphasis should have been placed upon the fact that the appellant in this case had started as a postmaster in Scudai in 1973. He carried on in this post until 1976 when he stumbled for the first time in his young life. The amount for which he would not account in this case was only $200/– and so far as the court is concerned this is the only offence known against him.

There can be no gainsaying that public servants receiving money from other members of the public must show very high standards of probity in the discharge of their fiscal duties. The loss of confidence in public institutions is incalculable when a public servant chooses to abuse his position of trust, as happened in this case.

I agree with the learned President that a deterrent sentence was called for.

But in all the circumstances of this case the ends of justice would equally have been met by the imposition of a very substantial fine. There is evidence that the appellant has reformed himself in the 7 years that have gone by since the date of the offence. The lesson that crime does not pay, however, must be driven home especially for public servants who may be tempted to abuse their trust.

I therefore substitute for the sentence imposed by the learned President, a sentence of 3 days imprisonment which shall be deemed to have been served by the presence of the appellant in the court below and before this court. The fine that will be imposed upon the appellant is in the sum of

$5,000/-. In default of paying this sum within 3 weeks of the date hereof the appellant shall serve 18 months' imprisonment.

Counsel for the appellant in the court below may well be deserving of some sympathy for the predicament in which he found himself when the accused insisted on pleading guilty against his advice. But in such a situation it may be a salutary rule for counsel to remember that in the last analysis they are officers of the court with an overriding duty to the cause of justice. Whilst taking due note of rule 16 of the Legal Profession (Practice and Etiquette) Rules 1978, it should also be borne in mind that an accused person should plead guilty or claim trial by his own mouth and not through his counsel or advocate: *R.* v. *Tan Thian Chai*[8]. Reference may also be made to *Archbold* Criminal Pleading Evidence and Practice 38th Edition paragraph 367 where it is clearly stated that

"The responsibility of pleading guilty or not guilty is that of the defendant himself, but it is the clear duty of defending counsel to assist the defendant to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the defendant what the result of a particular course of conduct is likely to be: *R.* v. *Hall* [1968] 2 Q.B. 787".

Once that point is passed, and the plea of guilt entered it is the duty of counsel who still feels that the facts do not amount to an offence to say so in unequivocal terms to the court of first instance. No mileage can be gained by some half-hearted submission on appeal that the plea of guilt was made against counsel's advice. But as the court has observed earlier it does not share the view of counsel that the facts in this case do not support the plea of guilt and the conviction.

This appeal is accordingly dismissed subject to the variation in the sentence earlier indicated.

Appeal dismissed.

Solicitors: *R.K. Menon & Co.*

DATIN PEGGY TAYLOR v. UDACHIN DEVELOPMENT SDN. BHD.

[O.Cr.J. (Vohrah J.) September 22, 1983]

[Kuala Lumpur – Civil Suit No. 656 of 1977]

Architects – Abandoned project – Fees – Custom or practice – Applicability of P.A.M. guidelines

The plaintiff, as personal representative of the estate of her late husband Datuk Eric Taylor (the architect), sued the defendants for the sum of $687,500. for professional services rendered by the architect's sole-proprietorship known as "Eric Taylor dan Rakan-Rakan" in respect of a proposed multi-storeyed commercial and residential complex (the project). The plaintiff claimed the said sum on the ground that there has been abandonment of the project by Udachin or, on the ground of *quantum meruit.*

There is no law prescribing the scale of fees for architects. However, the Institute of Architects called "Pertubohan Akiteck Malaysia" (PAM), which is a voluntary organisation which no practising architect registered with the Board of Architects set up under the Architects' Act, 1967 is obliged to join, has provided certain guidelines called "Conditions of Engagement and Scale of Professional Charges" (P.50). A practising architect who is a member of P.A.M. is under no legal obligation to charge the scale fees prescribed in P.50 so that the architect could have agreed that his fee be paid on a lower scale as stipulated in the terms of the architect's letter of engagement (P.14) in this case.

The court had to consider whether or not the P.A.M. guidelines as to the calculation of fees in the event of abandonment (or for work done) could be imported in P.14.

The writ in this case was issued on March 15, 1977 well before the death of the architect on August 8, 1977.

Held, allowing the application: the P.A.M. guidelines should be imported because they reflect the custom or practice of the architectural profession. P.14 seems to be limited to the specific question of calculating the full fee when the project was successfully completed and did not provide for the contingency of abandonment. The plaintiff would therefore be entitled to the sum of $685,622.50 and costs.

CIVIL SUIT.

G. Krishnan for the plaintiff.
B.E. Teh for the defendants.

Cur. Adv. Vult.

Vohrah J.: The plaintiff, as personal representative of the estate of her late husband Datuk Eric Taylor (the architect), sues Udachin Development Sdn. Bhd. (Udachin) for the sum of $687,500/- for professional services rendered by the architect's